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COMPLIANCE WITH THE FEDERAL FOOD, DRUG, AND COSMETIC ACT IN THE MARKETING OF FISHERY PRODUCTS

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Fish and fishery products obviously represent but one group of food commodities among many which are subject to the form of control provided by the terms of the Federal Food, Drug, and Cosmetic Act. Nevertheless, for many reasons, the seafoods collectively constitute an important item for consideration in the project planning of the Food and Drug Administration. It is noteworthy that by the terms of section 10 (a) of the Act of 1906, which has been continued in force and effect in the Act of 1938, seafoods are granted rights to a form of supervisory inspection not provided for other commodities. Uncertainties of fishing operations, the perishability of the raw material, the vicissitudes of handling and transportation and the confusion sometimes surrounding proper labeling combine to create problems of food law interpretation which bring the Administration squarely into the picture of fishery production and distribution.

The Food, Drug, and Cosmetic Act is broad in its scope and includes provisions which, in their effect, function to prevent harmful competitive trade practices. However, the statute is primarily a consumer protection measure and the mandates imposed upon the Administration pursuant to its responsibility in enforcing the law are such that first consideration must always be given to the welfare of the consumer. In this connection, the word "welfare" is to be interpreted as encompassing all matters pertaining to health, to the suitability of products for food purposes as measured by freedom from spoilage, filth and other obnoxious elements which render them offensive according to accepted standards, to misrepresentation which may constitute fraud affecting the financial resources of the buyer and to all other matters which bear upon the comfort and well-being of the consumer. In other words it is the duty of the Administration to prevent the shipment and sale of products that are adulterated or misbranded within the meaning of the Food, Drug, and Cosmetic Act. In rendering this form of consumer service, the channels of trade are at the same time kept clear for legitimate articles of commerce resulting in the betterment of conditions in the industry and the expansion of business attendant upon the desire to purchase by satisfied consumers. To this end, the Food and Drug Administration finds a place in any program to augment our food supply and to increase the utilization of our fishery resources.

Assuming that fish have been properly inspected and handled to provide only products which are free from decomposition, from objectionable parasites and from any other condition which might place them in the category of articles deemed to be "otherwise unfit for food", the final step in preparation for the market is labeling to inform the consumer of the true nature of his or her purchase. Because of the loose usage of common names for fishes and the lack of a standard glossary of names, the selection of a label designation may not always be easy; and yet not fraught with too many difficulties when a few clearly defined rules are kept in mind. A rule from high authority is to be derived from a decision of the United States Supreme Court delivered in connection with a case involving another product under the Food and Drug Act of 1906. In that case, the principles of which are equally applicable to the labeling of fishery products, the Court said, in part: "It is not difficult to choose statements, designs, and devices which will not deceive. Those which are ambiguous and likely to mislead should be read favorably to the accomplishment of the purpose of the Act. The statute applies to food and the ingredients and substances contained therein. It was enacted to enable purchasers to buy food for what it really is." These sentiments expressed by the Supreme Court are particularly pertinent to paragraph 403 (1) of the Food, Drug, and Cosmetic Act, which defines a food as misbranded unless its label bears its common or usual name. It is reasonable to require that the name under which fish is offered for sale should be that which is customary, prevailing, universal, familiar and popular in the sense that it is widely used and hence to be accepted as the common or usual name.

Most fish available in quantities sufficient for food supply, whether they are varieties heretofore and sometimes still considered "trash" fish or varieties finding ready acceptance on the market, have some sort of name long applied to identify them. Efforts to rename them are sometimes directed toward substitution of an attractive name for one which is inherently objectionable but in other instances the proposal to coin a new name may be, in part, a proposal to reintroduce a fish to which the public has an aversion under an alias which conceals its identity and induces the consumer to utilize that which he prefers not to use if fully informed of its true nature. Whether or not such procedure is justifiable on the theory that most of the prejudices which cause consumers to refuse to eat species of fish entirely fit for food are unreasonable is debatable but such labeling lends itself to charges of misrepresentation which the language of the Food, Drug, and Cosmetic Act is designed to prevent.

If the name to be used in the labeling is to mean anything to the consumer, it should not be one derived from the vernacular or slang of the trade or from the dialect of a geographical area which often give rise to curious and fantastic appellations. Thunderpumper, bubbler, and pumpkinseed are names which may be found in the dictionary as applied to fishes but such names can hardly be considered appropriate as common or usual names for labeling purposes nor is it believed that producers would seriously consider such names as properly identifying their products.

There are a few instances where a species of fish is equally well-known in various localities by different names. In such cases it might be decided reasonably that either of the names serves adequately as the common or usual name provided the labeling is not such as to mislead the consumers in the area in which it is sold. As illustrative of the type of case in point it is only necessary to mention the rockfish or striped bass and the squeteague, weakfish or salt-water trout. It would be difficult to referee a debate as to which name had priority as a common name but such an issue may become purely academic and unnecessary of settlement for labeling purposes if a name is selected which is most informative and least likely to mislead.

There is occasionally logical ground for accepting as a common name some designation which actually is erroneously applied according to the system of biological classification. This is, of course, a violation of basic rules and is justified only under peculiar and rare circumstances. The name should be one which has acquired standing through general acceptance and long usage. Even so it cannot be validated if it duplicates that of some variety which has rights to the name substantiated by measures of biological identity and of established position in commercial channels. To authenticate the name, "red snapper" for certain rockfishes red in color would condone the existence on the market of two articles under a name to which only one had proven rights. However, it has become the custom to designate certain Pacific rockfishes as rock cod. They are perhaps better known as rock cod than as rockfish and until evidence of misrepresentation is presented, at least, the Administration is taking no exception to the label designation rock cod even though these fish are not truly cod. Instances of this kind will not often occur. The measure is too severe. In most cases, a small amount of inquiry will disclose that the name proposed for use has been pre-empted by some other species to which it correctly applies.

The theory that membership in a family group of fishes is valid reason for adopting the common name of the family is not always sound when tested by the measure of consumer understanding. Included among the Clupeidae are numerous genera and species with distinctive common names which clearly differentiate them from the well-known and favored common sea herring. Proper labeling requires the use of the distinctive name and the avoidance of multiplication of products finding their way onto the market as "herring" with or without some modifying adjective. Other fish families are large and inclusive of many commercial varieties differentiated from each other by names not identical with the family name. Examples are readily found in the group which includes the salmon and trout and in that which includes the flounders, sole, and related flatfishes.

For reasons mentioned previously in this discussion there are occasionally incentives to coin new names. Review of the literature and experiences with the confusion and hodgepodge of terms applied under the guise of common names indicate a need for curtailment rather than expansion of fishery nomenclature. The list of names is already too long and contains many duplications and collisions. Furthermore, a newly created pseudonym can hardly be held to be the common or usual name of a fish which has long been identified by an entirely different designation.

In weighing the rights of names for labeling purposes, the considerations discussed here may and should be evaluated if the consumer is to be permitted to make an intelligent choice and is not to be misled into believing that the product which he or she eats is something different than it really is.

The possibilities of expansion of fish and shellfish resources are admittedly great. Modern facilities for catching, handling, preserving, and packaging fish are such that not more than an occasional lot of spoiled or otherwise unfit fish should be expected to appear in commerce and then only through circumstances beyond the control of the producer and distributor. The penalties of the Food, Drug, and Cosmetic Act become effective on fish and shellfish only when there is failure to apply sound principles of selection, preservation and sanitation or to label properly in conformity with the provisions of the statute. When the requirements of the Act are met, and the consumer's interests thus properly served, it naturally follows that our fishery resources are conserved through prevention of waste, the industry benefits by increased buyer good will and the path is made smoother for the introduction and popularization of new fishery products.

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